

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE LEE GREEN,

Defendant-Appellant.

UNPUBLISHED

October 18, 2007

No. 271290

Wayne Circuit Court

LC No. 06-003457-01

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, obstructing a police officer, MCL 750.81d(1), carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1).¹ Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of four to six years for felonious assault and five to seven and one-half years for felon in possession of a firearm. He was also sentenced to concurrent prison terms of two to three years for obstructing a police officer and five to seven and one-half years for CCW. Finally, defendant was sentenced to two years in prison for felony-firearm, with this sentence to run consecutive to the terms imposed for the other convictions. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for the ministerial tasks of preparing a SIR and scoring the guidelines for defendant's CCW conviction.

Defendant first argues that the trial judge incorrectly scored his prior North Carolina conviction for second-degree burglary as a high severity offense under prior record variable (PRV) 1, MCL 777.51. However, at the sentencing defendant's attorney informed the court that PRV 1 was scored correctly. Therefore, defendant waived this claim of error. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

In any event, there was no error in the scoring of PRV 1. Given the statutory definitions of second-degree burglary in North Carolina and second-degree home invasion in Michigan,² the

¹ Defendant was acquitted of a charge of assault with intent to commit murder.

² Compare NC Gen Stat 14-51 with MCL 750.110a(3).

trial court did not err in concluding that the most analogous Michigan crime to defendant's North Carolina second-degree burglary conviction is second-degree home invasion. See *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). The trial court thus properly scored PRV 1 at 25 points. MCL 777.51(1)(c).

Defendant also argues that the trial court erred by not filling out a separate sentencing information report (SIR) for each offense for which defendant was convicted. We agree in part and disagree in part. When a defendant is sentenced to serve concurrent terms for multiple convictions, a SIR must be filled out for each conviction in the highest sentence class. MCL 771.14(2)(e). Here, a SIR was completed for the felon in possession of a firearm conviction, which is a class E offense. MCL 777.16m. But a SIR for the CCW conviction, also a class E offense, *id.*, was not completed. Defendant was sentenced to concurrent terms of five to seven and one-half years for each of these convictions. Because both of these convictions are in the same class and carry the same sentence, a SIR should have been filled out for both convictions, MCL 771.14(2)(e), and the trial court should have scored both offenses, MCL 777.21(2). However, it was not necessary to prepare a SIR for defendant's convictions of felonious assault or obstructing a police officer because they are lower offense class crimes. See MCL 777.16d. Additionally, because the guidelines do not apply to felony-firearm, there is no need for a separate SIR for that crime. Accordingly, we remand for the ministerial tasks of preparing a SIR and scoring the guidelines for defendant's CCW conviction.

Defendant also argues that the trial court did not have substantial or compelling reasons for exceeding the recommended minimum sentence for his CCW conviction. Therefore, defendant further argues, he is entitled to be resentenced. We disagree. Initially, we note that the trial court was apparently operating under a misconception about which crime was scored for purposes of its departure analysis. A SIR was completed for the felon in possession conviction, but not for the CCW conviction. However, the trial court's reasons for the departure were specifically made in context of the CCW conviction. Thus, the underlying premise of this argument is invalid, i.e., there were no guidelines scored for CCW, so the sentence imposed did not depart from the recommended guidelines range.

As noted above, however, the guidelines should have been scored for CCW. Because the CCW and felon in possession of a firearm convictions are within the same class, we assume that, had the guidelines been scored for the CCW conviction, the resulting recommended minimum sentence would have been the same—19 to 47 months. The sentence actually imposed for CCW departed from this range, and the reasons for the departure are set forth on the record.³

A trial judge must have substantial and compelling reasons to exceed the sentencing guidelines and the reasons must be clearly articulated on the record. *People v Hornsby*, 251 Mich App 462, 473-474; 650 NW2d 700 (2002). The reasons must be of considerable worth and must "keenly" or "irresistibly" grab the attention of the court. *People v Fields*, 448 Mich 58, 67;

³ Defendant's sentence for felon in possession of a firearm also constitutes a departure. Defendant has not challenged that sentence on appeal. Nonetheless, for the same reasons noted for the CCW conviction, we would conclude that there was no error warranting relief.

528 NW2d 176 (1995). The reasons for departure must also be objective and verifiable. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A reason for the departure may not be based on an offender or offense characteristic that has already been considered under the sentencing guidelines, unless the trial court finds that that factor has been given inadequate or disproportionate weight. *Id.*; MCL 769.34(3)(b).

The trial court sentenced defendant to five to seven and one-half years (60 to 90 months) in prison for CCW. This is the maximum statutory sentence available, given defendant's habitual offender status. MCL 750.227(3); MCL 769.10. In support of its decision to depart, the trial court noted during the sentencing hearing that defendant showed a callous disregard for human life, needlessly endangered police officers' lives, and displayed a "callous attitude" in the courtroom during sentencing. The trial court also found that the scoring of 15 points for OV 19 (interference with the administration of justice), MCL 777.49, inadequately addressed the seriousness of defendant's conduct. In its written departure form, the court referenced only its conclusion that OV 19 failed to "adequately address the serious nature of the act [of] . . . shooting at a police officer," and its conclusion that "[d]efendant's conduct demonstrated a callous disregard for human life."

Defendant's asserted callous disregard for human life is a subjective judgment on defendant's personality. While the actions on which such a judgment might be based are capable of being confirmed, *Abramski*, *supra* at 74, the determination that those actions reveal an internal system of values devoid of sensitivity or sympathy for the lives of others is a subjective evaluation existing within the mind of the individual making that determination. Such a determination is an attempt to peer into the values and thought patterns of the actor. The value system that shapes any given action is no more external to the actor's mind than is the intent underlying his act. See *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). Therefore, this cited reason does not support the departure.

For these same reasons, defendant's alleged "callous attitude" during sentencing also does not support the departure.

The trial court also indicated that it was departing based on the failure of OV 19 to adequately address the circumstances of this case. MCL 777.49(b) provides that 15 points is scored where "[t]he offender used force or the threat of force against another person or the property of another person to interfere with the administration of justice." However, the statute does not differentiate between the types of force used. Thus, a person who struggles with an officer attempting to arrest him would receive the same number of points as a person who attempts to avoid arrest by firing a weapon at the officer. Moreover, OV 2 (lethal potential of a weapon possessed by the defendant), MCL 777.32, is not scored for a CCW conviction. MCL 777.22(5).

We conclude that the trial court did not err when it determined that the guidelines do not adequately account for the circumstances of this case. Namely, where a fleeing defendant fires at pursuing officers in a residential neighborhood. Moreover, given that the trial court elected to impose the most severe sentence authorized under the statutory scheme, and in view of the statements made by the trial court during the sentencing hearing, we conclude that the trial court would still have departed and would have departed to the same degree on this basis alone. See *People v Babcock*, 469 Mich 247, 260-261, 273; 666 NW2d 231 (2003). Further, we conclude

that such a departure is proportionate to the offender and the offense. *Id.* at 262. Therefore, defendant is not entitled to resentencing.

Finally, we reject defendant's argument that the trial judge engaged in improper fact-finding in scoring the sentencing guidelines. The trial court may properly make findings of fact when calculating a minimum sentence. *People v McCuller*, 479 Mich 672, 677-678; ___ NW2d ___ (2007).

Affirmed, but remanded for the ministerial tasks of preparing a SIR and scoring the guidelines for defendant's CCW conviction. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette